IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 12TH DECEMBER 2007 / 21ST AGRAHAYANA 1929

CRP.No. 345 of 2004

AGAINST THE ORDER DATED 18/12/2003 IN EA 349/02 IN EP 123/98 IN OS.219/1983 OF ADDL.SUB COURT, ALAPPUZHA

REVN. PETITIONER: PETTITIONER IN E.A/AUCTION PURCHASER

K.D.PRAKASAN, KOCHUPARAMBU,
NEHRU TROPHY WARD, ALAPPUZHA.

BY ADV. SRI.M.JACOB MURICKAN

RESPONDENTS: COUNTER PETITIONER IN E.A./DECREE HOLDER & JUDGEMENT DEBTORS:

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1. STATE BANK OF TRAVANCORE, BRANCH ALAPPUZHA, REPRESENTED BY ITS MANAGER.
2. M/S.SANTHI ENTERPRISES, CHUNGOM, ALAPPUZHA.
3. L.D.ASHA, W/O.ASHOK KUMAR, PARAMBILTHARAYIL HOUSE, KOTTAMKULANGARA.
4. P.D.SUDHA, W/O.SASIDHARAN, CHANDRIKABHAVAN, KESAVADASAPURAM, THIRUVANANTHAPURAM.
5. P.D.GANGADEVI, W/O.SASIKUMAR, VALLATHITHARAYIL HOUSE, CHETTIKULANGARA.P.O., MAVELIKKARA.
6. P.D.YAMUNADEVI, PARAMBITHARAYIL VEEDU, KOTTAMKULANGARA, ALAPPUZHA.
7. SAROJINI AMMA, PUTHENPARAMBIL, KANNANCHIRA, ALAPPUZHA.
8. DEVAKI SUKUMARAN, PARAMBITHARAYIL VEEDU, ALAPPUZHA. (EXPIRED)

ADDL.R9 TO R11:

ADDL.R9 ASHOK KUMAR, S/O.LATE SUKUMARAN,
PARAMBITHARAYIL HOUSE, KOTTAMKULANGARA,
ALAPPUZHA.

ADDL.R10 THARABHAI, D/O.LATE SUKUMARAN,
PARAMBITHARAYIL HOUSE,
KOTTAMKULANGARA, ALAPPUZHA.

ADDL.R11 YASODHA BAHULEYAN, W/O.BAHULEYAN,
THURUTHEL HOUSE, CHERAMAN KULANGARA WARD,
THATTAMPPALLY P.O., ALAPPUZHA.

RESPONDENTS 4 TO 6 ARE RECORDED AS THE LEGAL HEIRS OF THE DECEASED 8TH RESPONDENT AND ADDL.R9 TO R11 ARE IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED 8TH RESPONDENT VIDE ORDER DATED 30/1/2007 IN I.A.NO.3079/2006.

R1 BY ADV. SRI.SATHISH NINAN
R5, R6 AND ADDL.R9 TO R11 BY ADV. SRIR.AZAD BABU

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 12/12/2007, ALONG WITH CRP NO. 346 OF 2004, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.T.SANKARAN, J.

C.R.P. Nos. 345 & 346 OF 2004

Dated this the 12th December, 2007

O R D E R

The question involved in these Revisions is whether the court auction sale of the property belonging to two persons held in execution of a money decree could be set aside by invoking Section 47 of the Code of Civil Procedure, at the instance of the legal representatives of one of them, who died even before filing the Execution Petition and whose legal representatives were not made parties to the Execution Petition.

2. The parties are referred to as per their rank in C.R.P. No. 346 of 2004. The third respondent partnership firm of which respondents 4 to 7 are partners, availed a loan from the second respondent, the State Bank of Travancore. The suit filed by the bank for realisation of the amount was decreed on 3.9.1986. For realisation of the decree amount, Bank filed E.P.No.375 of 1994. In that Execution Petition, the property jointly owned by judgment debtors 6 and 7, and which was mortgaged in favour of the bank, was sought to be sold. The sale was to be held on 19.1.1998. No bidders participated in the auction. The executing court dismissed the Execution Petition for default on the same date.

3. On 4.6.1998, the Bank filed E.P.No.123 of 1998. On that date,

the judgment debtor No.7, Sarojini Amma, was not alive. (She died on 21.6.1996.) Her legal representatives were not made parties to the Execution Petition. The Execution Petition was filed as if Sarojini Amma was alive. In the Execution Petition, judgment debtors 2, 3 and 6 were served. Notice to judgment debtors 1, 4, 5 and 7 was effected by substituted service, that is, by newspaper publication. The property was sold in court auction on 20.1.2000. The revision petitioner purchased the property having an extent of 1.01 acres for a sum of Rs.1,01,000/-. The sale was confirmed on 24.1.2001.

4. The judgment debtor No.6 filed E.A.No.74 of 2000 under Order XXI Rule 90 of the Code of Civil Procedure to set aside the sale. The executing court dismissed that application on 24.1.2000 and the dismissal was confirmed in appeal, C.M.A.No.23 of 2001, on 14.3.2002. After the dismissal of E.A.No.74 of 2000 by the executing court, the sale was confirmed and the sale certificate was issued to the revision petitioner. The revision petitioner/auction purchaser filed E.A.No.349 of 2002 for delivery of possession.

5. The first respondent herein, who is the legal representative of judgment debtor No.7 Sarojini Amma, filed E.A.No.425 of 2003 under Section 47 of the Code of Civil Procedure to set aside the sale. It was

contended that the sale held with a dead person on the party array in the Execution Petition is null and void and that it will not bind the right, title, interest and possession of the petitioner therein (first respondent herein) over the property. It was alleged that the decree holder and the auction purchaser colluded together and fraud was played upon Court, which resulted in the sale of the property. It was also stated that no notice was served upon the petitioner therein.

6. The decree holder and the auction purchaser contended that E.A.No.425 of 2003 was not maintainable in law. Devaki Sukumaran, judgment debtor No.6, had filed an application to set aside the sale and that application was dismissed. Thereafter, her sister's legal representative is not entitled to question the sale. It was also contended that the first respondent herein was aware of the sale and the proceedings in E.A.No.74 of 2000. The auction purchaser contended that he cannot be blamed for lack of service of notice on the legal representative of Sarojini Amma.

7. The court below held that sale without notice to the legal representative of Sarojini Amma, judgment debtor No.7, is illegal and, therefore, it is liable to be set aside. However, it was held, the sale shall be set aside only in so far as it relates to the right of the petitioner in the

application (first respondent herein) over the decree schedule property, and to the extent to which she inherited as the legal representative of deceased 7th judgment debtor. In other words, the sale of the rights of the 6th judgment debtor was treated as having validly taken place. The Court held that it should be taken as sale for half the sale price fetched at the auction sale. Accordingly, direction was issued to refund Rs.50,500/- to the auction purchaser. Consequent on the order in E.A.No.425 of 2003, the court below dismissed E.A.No.349 of 2002 filed by the auction purchaser for delivery. These orders are under challenge in these two Civil Revision Petitions.

8. Sri.Jacob Murikan, learned counsel for the revision petitioner/ auction purchaser contended that the application under Section 47 of the Code of Civil Procedure was not maintainable to get rid of or to set aside the court auction sale. The legal representative of judgment debtor No.7 could have filed an application under Rule 90 of Order XXI and she having not done so within the period of limitation provided, she was precluded from maintaining an application under Section 47 of the Code of Civil Procedure. Learned counsel for the revision petitioner relied on the decisions in **K.P.M.Saheed** v. **Aluminium Fabricating Company** (1985 K.L.T. 991); **Chinnan Nadar Chellappan Nadar** v. **Subramonia Nadar Padmanabha Nadar** (1955 K.L.T. 380) and **Lalji Sah and others**

v. **Sat Narain Bhagat and others** (AIR 1962 PATNA 182).

9. Sri.R.Azad Babu, learned counsel appearing for respondents 6 and 7 in C.R.P.No.346 of 2004, contended that an application under Section 47 of the Code of Civil Procedure was the proper remedy since the illegality was of a nature which could be corrected only by recourse to Section 47. He submitted that pre-sale illegalities would be covered by Section 47 and Order XXI Rule 90 would not be applicable to such cases. Sri.Azad Babu further submitted that the court below was not justified in setting aside the sale only in respect of half right of the 7th judgment debtor and in approving sale in respect of the half right of the sixth judgment debtor. He submitted that setting aside of a sale could be made only as a whole and there cannot be a partial setting aside of the sale. Having found that the sale was illegal, there was no other option for Court to set aside the sale as a whole and no reservation could be made in favour of the auction purchaser in respect of part of the right of one of the judgment debtors. Sri.Azad Babu contends that even though the judgment debtors have not challenged the order passed by the court below, they could point out a patent illegality committed by the court and it could be corrected by the revisional court in the revision filed by the auction purchaser. Sri.Sathish Ninan, learned counsel appearing for the Bank, supported the revision petitioner. He also pointed out that the

executing court was not justified in not proceeding with the Execution Petition after setting aside the sale in respect of half right of the 7th judgment debtor. Since a direction was issued to return half the purchase price to the auction purchaser, the balance decree amount is to be realised in the Execution Petition, he submits.

10. In **Desh Bandhu Gupta** v. **N.L.Anand & Rajinder Singh** ((1994) 1 SCC 131), the Supreme Court held that:

> "Under Section 47 of the Code of Civil Procedure, all questions relating to execution, discharge or satisfaction of the decree should be determined by the executing court alone. The pre-sale illegalities committed in the execution are amenable to the remedy under Section 47. Post-sale illegalities or irregularities causing substantial injury to the judgment debtor are covered under Order XXI Rule 90."

In *Desh Bandhu Gupta's case*, it was also held that a court auction sale held without issuing notice under Rule 66 of Order XXI would be null and void. It was further held that:

> "A sale made without notice to the judgment debtor is a nullity since it divests the judgment debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality."

11. In in **K.P.M.Saheed** v. **Aluminium Fabricating Company** :

1985 KLT 991, a Division Bench of this Court considered the scope of and distinction between an application under Order XXI Rule 90 and Section 47 of the Code of Civil Procedure. It was held thus:

> "24. The application by the judgment debtor was under Order 21 Rule 90 CPC. This provision enables a sale to be set aside on the ground of material irregularity or fraud in publishing or conducting it. It is the material irregularity or fraud which affects the method and manner of publishing the proclamation and the actual conduct of the sale that clothes the court with a jurisdiction to set aside the sale under Order 21 Rule 90 CPC. Where Order 21 Rule 90 applies, S.47 is not available. However, where there is inherent illegality in the execution application, such as want of leave of court appointing a receiver, it is a matter arising in execution, outside the purview of Order 21 Rule 90 and thus within the scope of S.47 of the Code.
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> 25. The court below was therefore, wrong in considering the judgment debtors' application only under Order 21 Rule 90 when he had a specific case that the sale was invalid for want of a leave of the court which appointed the receiver and thus it should have considered the claim under S.47 of the Code, even though this specific provision was not mentioned in the application. ..."

12. In **Rajarethna Naikkan** v. **Parameswara Kurup** **(1997 (1) KLT 777),** after considering the scope of Order XXI Rule 90 and Section 47 of the Code of Civil Procedure, it was held thus:

> "12. When a judgment debtor seeks the setting aside of a sale by invoking O.XXI R.90 of the Code, he is accepting the factum of the sale or the reality of the sale and is only questioning it on the basis of the material irregularities referred to in O.XXI R.90 of the Code. In a case, where the judgment debtor is proceeding under S.47 of the Code, he attacks the sale either on the ground that it is void or that it is voidable on ground of illegality not covered by O.XXI R.90 of the Code. In the case of

simultaneous applications under O.XXI R.89 of the Code and O.XXI R.90 of the Code, it has been recognised that whereas in making the application under O.XXI R.89 of the Code, the judgment debtor accepts the validity of the sale, in making an application under O.XXI R.90 of the Code, he is questioning the validity of the sale and hence he cannot prosecute both the applications simultaneously. But is that the position when an application under O.XXI R.90 of the Code and an application under S.47 of the Code are sought to be simultaneously prosecuted? I think not; because the grounds available for setting aside a sale under O.XXI R.90 of the Code are not the same as the grounds available under S.47 of the code and in the words of the Division Bench where O.XXI R.90 applies, S.47 is not available. In *Mangal Prasad* v. *Krishna Kumar Maheshwri* (AIR 1992 SC 1857) the Supreme Court has pointed out that an application under S.47 of the Code cannot be treated as an application under O.XXI R.90 of the Code and hence the bar prescribed under O.XXI R.89(2) of the Code insisting on withdrawal of the application for setting aside the sale would not come into play at all. It is therefore, clear that the relief that is sought for in an application under O.XXI R.90 of the Code of Civil Procedure, is not the same as the relief that can be claimed in an application under S.47 of the Code, though both can result in the relief of setting aside the sale being granted. I am therefore, of the view, that the doctrine of election cannot apply to disable the judgment debtor from maintaining an application under S.47 of the Code of Civil Procedure, merely because he has earlier filed an application under O.XXI R.90 of the Code. The decision of the Calcutta High Court in *Sri.Madan Mohan* v. *Bejoybati Dasi* (AIR 1954 Cal.202) was only one relating to applications under O.XXI R.89 and Order XXI R.90 of the Code and in view of the decision of the Supreme Court in *Mangal Prasad's* case the principle referred to therein cannot be extended to an application under S.47 of the Code of Civil Procedure and in the light of the discussion above, to apply the doctrine of election in the case of applications under O.XXI R.90 and S.47 of the Code of Civil Procedure. I therefore, overrule the contention on behalf of the decree holder that the judgment debtor having earlier applied for setting aside the sale under O.XXI R.90 of the Code is estopped from filing an application under S.47 of the Code of Civil Procedure."

13. At the time when the Bank filed the second Execution Petition, namely, E.P.No.123 of 1998, the seventh judgment debtor was not alive. Her estate was not represented as her legal representative was not made a party. The first respondent, who is a legal representative of the judgment debtor No.7 could have, had she received notice in the Execution Petition, paid off the entire decree debt and could have averted the sale. She could very well contend before the executing court that it was not necessary to sell the entire extent of 1.01 acres for realisation of the decree amount which was less than Rs.One lakh. She could also suggest her own estimate of the value of the property. Sale of property without notice to the first respondent should not have been made by the executing court, thereby depriving her valuable rights. The proceedings in execution as against the estate of the 7th judgment debtor were, therefore, illegal. Being a pre-sale illegality, it could be challenged by the first respondent by invoking Section 47 of the Code of Civil Procedure. It was not necessary for the first respondent to file an application under Rule 90 of Order XXI to set aside the sale. The case of the first respondent is that the very proceeding for sale of the property without issuing notice to her predecessor in interest, who was a co-owner of the property, was illegal. Her case is not that the sale is vitiated by material irregularity or fraud in publishing and conducting the sale, which attracts

Rule 90 of Order XXI. The very maintainability of the Execution Petition as against the estate of the seventh judgment debtor was under challenge in the application filed by the first respondent. Such an objection could very well be taken by invoking Section 47 of the Code of Civil Procedure. The contention of the revision petitioner that the remedy of the first respondent was to file an application under Rule 90 of Order XXI is unsustainable and it is accordingly rejected.

14. . For the following reasons, I do not propose to decide the contention put forward by Sri.Azad Babu that the executing court having found that the proceedings for sale were illegal, the sale as a whole should have been set aside. (1) The first respondent has not challenged the order passed by the executing court by filing a Revision; (2) The affected party, namely, the 6th judgment debtor has not filed a Revision challenging the order passed by the court below; (3) The 6th judgment debtor filed E.A.No.74 of 2000 to set aside the sale, which was dismissed by the executing court on 24.1.2001 and the dismissal was confirmed in Appeal on 14.3.2002. In that proceeding, the 6th judgment debtor contended that at the time of filing of the Execution Petition the 7th judgment debtor was not alive. That means the 6th judgment debtor could have raised the very maintainability of the Execution Petition for sale of the rights of both the co-owners in that application. The executing court

having dismissed E.A.No.74 of 2000 and the 6th judgment debtor having not filed any application under Section 47 of the Code of Civil Procedure, it is not open to the judgment debtors to contend that the sale affecting the share of the 6th judgment debtor also should have been set aside. (4) There is yet another reason, that is, if the revision petitioner/auction purchaser withdraws the Civil Revision Petitions, how could the first respondent seek for any relief as is now raised her. Evidently, she cannot.

15. Sri.Sathish Ninan, learned counsel appearing for the Bank, contended that the executing court should have proceeded with the execution proceedings for realisation of the balance amount due to the Bank. This contention is sound. I hold that the executing court shall revive the Execution Petition for realization of the balance decree amount.

16. On a careful consideration, I do not think that the decisions in 1955 K.L.T 380 and A.I.R. 1962 Patna 182 are relevant for the purpose of the present case. In 1955 KLT 380, daughter of the judgment debtor was impleaded. The obstructor to execution claimed under a will executed by the deceased judgment debtor. It was held that legatee did not get possession. In that context, it was held that when execution proceedings were conducted with a wrong legal representative on the party array or

without impleading one of the legal representatives the sale would be valid unless the failure to bring on record the true legal representative was due to fraud or collusion of the part of the decree holder. The factual position is different in the present case.

For the aforesaid reasons, the order passed by the executing court in E.A.No.425 of 2003 setting aside the sale, in so far as it relates to the rights of the 7th judgment debtor, is confirmed and C.R.P.No.346 of 2004 is dismissed. C.R.P.No.345 of 2004 is also liable to be dismissed since the court below was justified in rejecting the prayer for delivery of the property. The revision petitioner/auction purchaser has to seek other remedies to get possession of his half right in the property. The executing court is directed to revive E.P.No.123 of 1998 for realization of the balance decree debt. No order as to costs.

(K.T.SANKARAN)
Judge

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